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SERVICE DATE – FEBRUARY 17, 2005

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 257X)

NORFOLK SOUTHERN RAILWAY COMPANY–ABANDONMENT EXEMPTION–IN
BLACKFORD COUNTY, IN

Decided: February 16, 2005

Norfolk Southern Railway Company (NSR) filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon an 8.60-mile line of railroad between milepost RK-130.00 at Converse, and milepost RK-138.60 at Hartford City, in Blackford County, IN. Notice of the exemption was served and published in the Federal Register on January 19, 2005 (70 FR 3102-03). The exemption is scheduled to become effective on February 18, 2005.

The Board's Section of Environmental Analysis (SEA) issued an environmental assessment (EA) in this proceeding on January 24, 2005, addressing environmental concerns. First, in the EA, SEA states that the U.S. Army Corps of Engineers (Corps) had not responded to NSR's environmental report at the time the EA was prepared. SEA indicates that, because approximately three of the bridges that would be removed during salvage operations are located at water bodies, permits may be required from the Corps. Therefore, SEA recommends that a condition be imposed requiring that NSR, prior to initiating salvage activities, consult with the Corps, Louisville District, to determine the applicability and need for permits. Second, SEA states that the U.S. Environmental Protection Agency - Region 5 (USEPA) provided a number of comments to NSR's environmental report. Therefore, to ensure that USEPA's concerns are appropriately addressed, SEA recommends that a condition be imposed requiring that NSR consult with USEPA prior to initiating salvage activities. Third, SEA states that, based on data published by the U.S. Fish and Wildlife Service (FWS) and the Indiana Department of Natural Resources, two Federally listed species, the bald eagle (Haliaeetus leucocephalus) and the Indiana bat (Myotis sodalis), may occur in Blackford County. According to NSR, the right-of-way (ROW) proposed for abandonment does not occur within any known Federal or state parks or forests, or wildlife sanctuaries. SEA states that FWS had not responded to NSR's environmental report at the time the EA was prepared. Accordingly, SEA recommends that a condition be imposed requiring that NSR, prior to initiating salvage activities, consult with the FWS Ecological Service Field Office in Bloomington, IN, and report the results of those consultations to SEA. Fourth, SEA states that the U.S. Department of Commerce, National Geodetic Survey (NGS), has identified one geodetic station marker that may be affected by the proposed abandonment. Therefore, SEA recommends that a condition be imposed requiring that NSR notify NGS 90 days prior to conducting salvage activities to plan for relocation of the marker. Fifth, SEA states that the Indiana

Bureau of Historic Preservation and Archaeology (the SHPO) acknowledged receipt of NSR's historic report and requested additional information. Therefore, pending completion of the SHPO's assessment, SEA recommends that NSR be required to retain its interest in and take no steps to alter the historic integrity of the ROW until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA).

Comments to the EA were due on February 8, 2005. No comments were received by the due date. Accordingly, the environmental conditions recommended by SEA in the EA will be imposed.

On February 3, 2005, the Indiana Trails Fund, Inc. (ITF), late-filed a request for issuance of a notice of interim trail use (NITU) for the line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act),¹ and for a public use condition under 49 U.S.C. 10905,² to negotiate with NSR for acquisition of the ROW for use as a recreational trail. ITF has submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for payment of any and all taxes that may be levied or assessed against, the ROW for trail purposes, as required at 49 CFR 1152.29, and has acknowledged that the use of the ROW for trail purposes is subject to future reconstruction and reactivation for rail service. By facsimile received on February 8, 2005, and by letter filed on February 14, 2005, NSR states that it agrees to the issuance of a NITU.

Because ITF's request complies with the requirements of 49 CFR 1152.29 and NSR is willing to negotiate for trail use, a NITU will be issued for the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, NSR may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the ROW for trail purposes is subject to restoration for railroad purposes.

¹ The January 19, 2005 notice provided that trail use/rail banking requests were to be filed by January 31, 2005. However, in Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 900 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that ITF's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company—Abandonment Exemption—in Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

² SEA indicated in the EA that the ROW may be suitable for other public use following abandonment.

As noted above, ITF has also requested a 180-day public use condition. ITF requests that NSR be prohibited from disposing of the corridor, other than tracks, ties and signal equipment, except for public use on reasonable terms, and that NSR be barred from removing or destroying any potential trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment. ITF states that the time period is needed to commence negotiations with NSR.

As an alternative to interim trail use under the Trails Act, the ROW may be acquired for public use as a trail under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2). Because ITF has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the February 18, 2005 effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. If a trail use agreement is reached on a portion of the ROW, NSR must keep the remaining ROW intact for the remainder of the 180-day period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the ROW that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NSR is not required to deal exclusively with ITF, but may engage in negotiations with other interested persons.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. The late-filed request for a NITU under 16 U.S.C. 1247(d) is accepted.

3. Upon reconsideration, the notice served and published in the Federal Register on January 19, 2005, exempting the abandonment of the line described above, is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below, for a period of 180 days commencing from the February 18, 2005 effective date of the exemption (until August 17, 2005), and subject to the conditions that NSR: (1) prior to initiating salvage activities, consult with the Corps, Louisville District, to determine the applicability and need for permits; (2) prior to initiating salvage activities, consult with USEPA; (3) prior to initiating salvage activities, consult with the FWS Ecological Service Field Office in Bloomington, IN, and report the results of those consultations to SEA; (4) notify NGS 90 days prior to conducting salvage activities so NGS can plan for the relocation of the geodetic station marker identified on the line; and (5) retain its interest in and take no steps to alter the historic integrity of the ROW until completion of the section 106 process of the NHPA.

4. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, NSR may discontinue service and salvage track and related materials. NSR shall keep intact the ROW, including bridges, trestles, culverts and tunnels, for a period of 180 days to enable any state or local government agency, or other interested person, to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before August 17, 2005, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

5. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the ROW.

6. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the ROW.

7. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by August 17, 2005, interim trail use may be implemented. If no agreement is reached by that time, NSR may fully abandon the line, provided the conditions imposed in this proceeding are met.

9. This decision is effective on its date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary